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In the matter of:

Digital Performance Right in
Sound Recording and Ephemeral
Recording

Docket No.
2000-9

CARP DTRA
1 & 2

CARP Hearing Room
LM-414
Library of Congress
Madison Building
101 Independence Ave, SE
Washington, D.C.

Wednesday,
October 10, 2001

The above-entitled matter came on for rebuttal
hearing, pursuant to notice, at 10:00 a.m.

BEFORE

THE HONORABLE ERIC E. VAN LOON	Chairman
THE HONORABLE JEFFREY S. GULIN	Arbitrator
THE HONORABLE CURTIS E. von KANN	Arbitrator

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1 P-R-O-C-E-E-D-I-N-G-S

2 11:03 a.m.

3 MR. STEINTHAL: So we were able, through
4 contacts to three of the five major studios --
5 Paramount Pictures, Walt Disney and Warner Brothers --
6 to secure certain data that would permit Dr. Jaffe to
7 conduct an analysis. And we basically asked for data
8 with respect to -- we'll start with movies -- movie
9 transactions for a concrete period of time within the
10 last two years. For example, I think in the case of
11 each of the studios, they gave us movie transactions,
12 which we did not select, they basically gave us their
13 slate within a given time period of pictures that they
14 produced and have the data for.

15 Now, again what we get into in the movie
16 world is you often have situations where a studio may
17 distribute 20 pictures in the course of a year but
18 only really produce themselves seven or eight or ten.
19 A lot of times there's this phenomenon called negative
20 pickups where some independent producer does all the
21 production work, the distributor, quote, "picks up the
22 negative," and distributes it but doesn't have the

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1 same relationship in terms of having the data and
2 having conducted the negotiations.

3 So, basically, they gave us their data
4 with respect to pictures that had any, according to
5 them, any significant degree of source music. And,
6 again, if you're doing a movie and the only music to
7 speak of is written expressly for the movie -- suppose
8 you have a movie where 95 percent of the music is
9 score music. Well, in that situation you're not going
10 to have any observations that are relevant to this
11 analysis, because all the music's been written for the
12 movie. There's no, what is in the jargon, source
13 music, no preexisting sound recordings that are being
14 used as part of the movie, because virtually all the
15 music in it has been written by the score writer, and
16 you don't have the relationship where you have source
17 music and you can make observations about one versus
18 the other.

19 So we were advised that they were going to
20 give us the movies during -- and I think with two of
21 the studios they gave us their year 2000 slate where
22 they had the movies that they produced containing any

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1 significant source music. And I think on the Disney
2 side, it was a period -- it was a year again, but it
3 was like June to June, June 200 to June 2001.

4 Now, what did they give us? Well, in
5 fact, the way it worked was that with respect to
6 Warner Brothers, they did the review and they gave us
7 a summary of the transactions, the underlying sync and
8 master use transactions, and provided an opportunity
9 to check the data, if you will, against their summary
10 to make sure it was accurate. Similarly, with respect
11 to Paramount, they did the same thing, and in
12 addition, they gave us a summary document that they
13 had prepared, summarizing again the numbers relevant
14 to the sync and the master use fees.

15 On the Disney side, and this -- and
16 Paramount, as well, gave us the opportunity -- gave
17 Dr. Jaffe the opportunity to check the underlying
18 licenses against the summary they had prepared to make
19 sure the numbers were accurate.

20 ARBITRATOR VON KANN: What does that mean?

21 MR. STEINTHAL: In other words --

22 ARBITRATOR VON KANN: He looked at the

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1 agreements?

2 MR. STEINTHAL: Yes, yes.

3 ARBITRATOR VON KANN: All 800 of them?

4 MR. STEINTHAL: No. Well, on the
5 Paramount side, I believe one of Dr. Jaffe's staff
6 members working with him closely on his papers
7 reviewed all of the underlying source materials on
8 Paramount. I don't believe it was done on a census
9 basis on Warner.

10 And with respect to Disney, what Disney
11 has is a what they call their music licensing review.
12 They have a schedule that they prepare on the ordinary
13 course of business that summarizes -- having nothing
14 to do with the CARP and nothing to do with this
15 production -- they have a film-by-film schedule
16 indicating for every piece of music that ultimately
17 gets into the film a summary of the rights issues and
18 the fees paid. And they provided Dr. Jaffe with that
19 summary for the one-year time period covered by the --
20 I think it was June to June, June 2000 to June 2001.

21 So in that respect, reliance by Dr. Jaffe
22 was made on the ordinary course of business summary

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1 created by Disney, logging each transaction and
2 indicating the relevant terms and conditions,
3 including the fees paid for those transactions.

4 Now, there are 851 "observations," quote,
5 unquote, contained in the data. And I think Mr.
6 Garrett's correct that if you look at it from the
7 standpoint, if it breaks out evenly, 400 and some odd
8 sync licenses and 400 and some odd master use licenses
9 that would literally underlie this data.

10 Now, I'll say this: We are in an odd
11 position. We'd be happy, in an odd way, if every
12 piece of paper, was available. But by the same token,
13 it was provided to us with direct instructions that
14 things should be as limited as possible in burden and,
15 because of the very confidential nature of these
16 transactions, in what gets produced here.

17 I have had several conversations with Mr.
18 Garrett hoping to come to a compromise that, frankly,
19 I could broker between the RIAA's desires to have data
20 that would give them a comfort level as to exactly
21 what is underlying the schedules that were prepared by
22 the studios. He's asked for a number of things that

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1 I've agreed to give him already, subject to the
2 Court's ordering it, because, again, I'm in a
3 situation where my instructions are provide as little
4 as possible, instructions from the third parties,
5 because of their concerns about confidentiality.

6 I have advised them that they're not going
7 to get away with providing no information and that I
8 would get back to them after presenting their case, if
9 you will, and having the Panel order whatever it is
10 that fairly gives the RIAA an opportunity to test the
11 data without unduly burdening third parties to this
12 proceeding.

13 ARBITRATOR VON KANN: Why are they
14 concerned about confidentiality if his people look at
15 it but not if Jaffe looks at it and puts it in
16 evidence here?

17 MR. STEINTHAL: It's basically, Your
18 Honor, an issue of industry paranoia, for lack of a
19 better word. Every studio is worried that another
20 studio's going to find out what they paid for a
21 certain sync fee or a master use fee. Dr. Jaffe's not
22 in the business, okay? So Dr. Jaffe --

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1 ARBITRATOR VON KANN: But they're telling
2 us what they paid for it. This is a matter of simply
3 verifying.

4 MR. STEINTHAL: Well, if you look at Dr.
5 Jaffe's report -- I don't know if you've looked at it
6 yet --

7 CHAIRMAN VAN LOON: Nothing specific is
8 there.

9 MR. STEINTHAL: It doesn't identify the --
10 it says Studio A, Studio B, Studio C composition --

11 CHAIRMAN VAN LOON: Right.

12 MR. STEINTHAL: And we identified the
13 composition but it's not by attribution. Nothing's
14 attributed to Warner specifically or Disney
15 specifically. And their real concern, and it is a
16 legitimate industry concern, is that this data gets
17 out that Warner paid less for Moondance than Paramount
18 did, and the use is comparable. What's going on here?
19 I mean it's very competitive in that respect, and
20 that's why they've gone to great lengths to try to
21 limit that which gets produced.

22 CHAIRMAN VAN LOON: They can actually feel

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1 great comfort that what he finds is it's 95, 96, 97.
2 I mean it's so close that nobody is clearly making a
3 killing --

4 MR. STEINTHAL: On the relationship issue,
5 Your Honor.

6 CHAIRMAN VAN LOON: Yes.

7 MR. STEINTHAL: But what is clear is that
8 the relationship issue, sync and masters are almost
9 invariably one to one, but the absolute dollars does
10 vary. You may find that Studio X paid \$50,000 for the
11 composition that Studio Y paid \$30,000 for. That's
12 where the rub is. I think that's one of the key
13 issues.

14 ARBITRATOR GULIN: But as we sit here
15 today, you don't know whether they would object to
16 providing copies of these licenses.

17 MR. STEINTHAL: I do. Let me go on,
18 because I've had several conversations with Mr.
19 Garrett. Again, I feel like I'm the broker in this,
20 and I'm trying to -- as I said, if I had my druthers,
21 everything would be out in the open, but those weren't
22 the circumstances surrounding our ability to get the

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1 data to Dr. Jaffe in the first place.

2 CHAIRMAN VAN LOON: Could I, Mr.
3 Steinthal, ask the question, if where you're going is
4 if you had an order from the CARP directing that this
5 be done, which with no subpoena power and various
6 other shortcomings may be completely unenforceable,
7 but you'd have a piece of paper, you could say, "The
8 devil made me do it," that you think in fact from the
9 conversations you've had so far that that would do the
10 trick?

11 MR. STEINTHAL: To a certain extent, and
12 that's what I'm going to get to. Because what I tried
13 to do is find out what the RIAA would accept in the
14 way of less than a full universe of every single sync
15 license and master use license underlying the data and
16 what I think the studios would, under the
17 circumstances produce, albeit under very restricted
18 protective order.

19 Mr. Garrett asked -- he sent us an e-mail
20 the other day and he asked us for six things, and I'm
21 substantially there as to what I think the labels,
22 upon -- I mean the studios, upon being ordered to do

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1 so, would agreed to do. First of all, the request has
2 been made that for every single observation, we
3 identify who the studio was, what the film was, what
4 the song was, who the publisher or the label was and
5 what the fee was. And we're fine with that, again,
6 subject to a protective order, which is outside
7 counsel only. There would be no question as to all
8 841 of those observations or however many observations
9 there were who the copyright owner was, what the song
10 was, what the movies was. So all that identifying
11 information would be made available.

12 CHAIRMAN VAN LOON: Let me just interrupt
13 again, if I can, to make sure what you're doing here.
14 You would need -- assuming that you're in agreement,
15 meeting of the minds, with Mr. Garrett on his points
16 one through six, or five of the six or whatever,
17 you're nonetheless going to need a CARP directive or
18 --

19 MR. STEINTHAL: Yes. I'm going to need an
20 order that says that we are ordered to produce the
21 following materials --

22 CHAIRMAN VAN LOON: Okay.

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1 MR. STEINTHAL: -- that I can then go to
2 the studios and say, "We've been ordered to produce
3 this stuff. Unless we get it from you, we've got this
4 very difficult situation." No, there's no subpoena
5 power, but they know, I've been in touch with all of
6 them.

7 And, again, as the Panel appreciates,
8 these companies are third parties, they do have
9 relationships on both sides of the fence, but they are
10 not directly involved in this. The studios,
11 themselves, and I can't underscore enough how, yes, in
12 the big picture there are AOLs of the world, there are
13 Viacom in the world, but if you're the guy who's
14 running the Music Group at Disney, you're not getting
15 help from anybody else in responding to these
16 inquiries.

17 And Disney is the least involved in this
18 proceeding, in an odd sort of way, in the sense that
19 they're not actively participating through any of
20 their divisions other than through they do have a
21 record company that is an RIAA member, but it's not a
22 huge record company, it's not one of the five majors.

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1 They do own ABC, which has radio stations, but they
2 are not streaming right now. So it's an odd
3 situation.

4 We're asking companies, in particular
5 people at companies, that do not have any vested
6 interest in the outcome of this proceeding to go
7 through lots of data and provide them to the Panel as
8 part of the ability to see what Dr. Jaffe did. And
9 that's why I think we can accommodate much of Mr.
10 Garrett's desires in a manner I think the studios will
11 agree to cooperate with. And if I can continue, I'll
12 explain exactly --

13 ARBITRATOR VON KANN: One question on the
14 mechanics. You say Jaffe sent an aide, I think you
15 said, in a couple -- so someone who works with Jaffe
16 actually went to the studio and sat down in a room
17 somewhere and somebody brought in a bunch of
18 documents, and he spent a day looking through it or
19 whatever?

20 MR. STEINTHAL: That is true with respect
21 to one of the studios, yes.

22 ARBITRATOR VON KANN: Only one?

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1 MR. STEINTHAL: Right.

2 ARBITRATOR VON KANN: The others handled
3 it --

4 MR. STEINTHAL: With respect to one of the
5 studios, that was done only on a spot basis. And with
6 respect to the other studio, Disney, it was done
7 entirely off of this ordinary course of business log
8 that summarizes in the ordinary -- again, I can't --
9 I want to be very clear, this is not something that
10 was created for the CARP. This is their Bible, if you
11 will. When films are being done and completed, they
12 log in all the songs that have been included, what the
13 key terms are, what the price is that's paid for each,
14 and they have that log, and the log was the basis for
15 the Disney movies and TV shows of the information.

16 CHAIRMAN VAN LOON: That's the standard
17 Disney operating procedures on all of these.

18 MR. STEINTHAL: That's right. And as I
19 get to this, I will explain what Disney is offering us
20 to do here in a manner to try to limit its burden but
21 at the same time provide the Panel and the RIAA an
22 ability to understand what's going on.

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1 ARBITRATOR VON KANN: I understand it has
2 an overarching sort of point without -- before we get
3 to specifics, I can understand the difficulties you've
4 described, but isn't it perfectly clear that we can't
5 receive Jaffe's testimony on this point unless they
6 have a chance to look at the same stuff he looked at?
7 I can't see any way around that. Maybe life is hard,
8 and maybe you're dealing with paranoid people. Tough.
9 You can't put it in and say, "Our guy checked it out,
10 but these guys can't." Now, we have to figure out
11 some fair, legitimate way for them to check it out
12 that isn't too burdensome.

13 MR. STEINTHAL: And that's where I'm
14 going.

15 ARBITRATOR VON KANN: And maybe if they're
16 paranoid that these record labels will do it, maybe
17 they designate some independent guy to go in and check
18 it out. But I can't see how you can possibly put
19 Jaffe's analysis in unless they get to look at exactly
20 what he looked at.

21 ARBITRATOR GULIN: I think what we're
22 doing now is you're reciting an offer to the other

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1 side of what you're --

2 MR. GARRETT: No, no, no. This concerns
3 me, because this is an offer that I made to settle
4 this dispute here. I want to make it very clear that
5 I believe that we're entitled to all of the underlying
6 agreements and the associated records here. Those are
7 all underlying documents within the meaning of the
8 CARP rules. There's no question in our mind that
9 those documents should have been produced to us last
10 Friday.

11 I made an offer to try to get this thing
12 resolved here, because I, too, am concerned about
13 burdens here. I am concerned about having to cross
14 examine Mr. Jaffe in a relatively short period of
15 time, and before that, going through hundreds of
16 different records here. This is a study that I
17 believe should have been presented during the direct
18 case. This should have been presented during the
19 direct case when we would have had three months or so
20 to prepare for it, when we would have had an
21 opportunity to bring a rebuttal witness in. This is
22 nothing more than a study designed to support

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1 statements that Mr. Jaffe made during the direct case.

2 But putting that issue aside, now I
3 believe we're entitled to all of this and I really do
4 have an objection with Mr. Steinthal without my
5 consent here reciting to you all of the terms of an
6 offer that I made to resolve this. I think the issue
7 here is what is it that these companies are willing to
8 do at this point here, and whether that is sufficient
9 to satisfy their obligations.

10 MR. STEINTHAL: Then I won't go through
11 the list that Mr. Garrett and I discussed, and I'll
12 just limit it to what I believe we can obtain from the
13 studios that I believe would be a fair approach to
14 this issue and constitute, at the same time, virtually
15 all that Dr. Jaffe has had access to as well.

16 As I said in the first instance, the
17 identity of every transaction is not going to be an
18 issue. We will be able to identify by name, movie,
19 song, et cetera, every "observation," quote, unquote,
20 that's underlying this aspect of Dr. Jaffe's study.

21 As far as the actual underlying agreements
22 -- sync licenses and master use licenses -- with

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1 respect to Warner Brothers and Paramount, we believe
2 that a fair sample of the underlying agreements,
3 coupled with the actual summaries that were prepared
4 by those studios and given to Dr. Jaffe, should be
5 adequate. In other words, putting aside Disney for a
6 minute, each of Warner Brothers and Paramount created
7 a schedule for the movies and programs that were
8 within the time frame that we talked about, and
9 delivered to Dr. Jaffe a schedule, by film and title
10 of each transaction and what the fee was.

11 What we would propose to do is provide
12 those summaries, plus a sample of the actual
13 underlying agreements so that the RIAA would have both
14 the ability to assess whether the agreements comport
15 with the summaries that were prepared by the studios
16 themselves in the first place, as well as having the
17 hard documents to look at, and if they wanted to cross
18 examine Dr. Jaffe about certain terms and conditions
19 contained in any of these licenses, then fine. But it
20 would be done on a sample basis rather than on a
21 census basis to minimize the burden to the studio.

22 With respect to Disney, Disney very much

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1 would prefer to provide the actual log, which is its
2 ordinary course of business log, with a declaration,
3 if that would help the cause, as to exactly what that
4 log is meant to contain in the way of information and
5 confirming that it is done in the ordinary course and
6 having nothing to do with this CARP, and that it does
7 in fact lay out the key terms and fees paid for all
8 the songs that are contained in the movies and TV
9 shows that are covered by the log.

10 So with respect to the three studios, it's
11 sort of category A would be Paramount and Warner
12 Brothers, and category B would be Disney. Disney
13 would prefer not to undertake the burden of going back
14 and pulling out all of the licenses associated with a
15 sample of the films and instead provide, in essence,
16 a census through the log that it keeps with a
17 verification as to exactly what is and is not
18 contained in that log.

19 In addition, we would be prepared to
20 provide the actual summary documents that we have
21 received. So to the extent that the studios have
22 created summaries that were provided to Dr. Jaffe,

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1 we'll produce those in discovery. We have no
2 objection to doing that, other than the fact that we
3 need to have an order compelling us to do it and that
4 it be done on a restricted basis.

5 So, basically, I think we can fairly get
6 to a result where all of the materials furnished to
7 Dr. Jaffe in terms of the summary documents will be
8 provided to the RIAA. The log from Disney, which is
9 all that Dr. Jaffe relied upon with respect to Disney,
10 will be provided, along with some sort of declaration
11 so that it's clear that it is an ordinary course of
12 document.

13 This is, to me, not unlike the P&Ls we
14 were talking about before in the sense that it's an
15 ordinary course of document setting forth the key
16 financial terms that relate to the films that are the
17 subject of this data. And it is exactly what Dr.
18 Jaffe looked at.

19 ARBITRATOR VON KANN: In the case of
20 Disney, Jaffe did not see the underlying agreements.

21 MR. STEINTHAL: That's correct.

22 ARBITRATOR VON KANN: Jaffe only saw the

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1 log.

2 MR. STEINTHAL: Correct.

3 CHAIRMAN VAN LOON: And this offer is to
4 provide 100 percent of what Jaffe saw.

5 ARBITRATOR VON KANN: Yes. That's what it
6 amounts to.

7 CHAIRMAN VAN LOON: Right.

8 MR. GARRETT: Well, let me just make clear
9 that when we were talking about their discovery
10 request of us, it goes beyond just what our expert
11 saw. We talked about Dr. Schink. All Dr. Schink saw
12 was the different exhibits that had been produced by
13 the witnesses who we are bringing in to testify. That
14 was not sufficient for them. They wanted the
15 underlying documents, even though Dr. Schink did not
16 see them. I think the Copyright Office rules are also
17 very clear, or least the interpretations of those
18 rules are very clear, that the fact that didn't see
19 them is not determinative here of whether it's to be
20 turned over.

21 In this case, we're talking about
22 agreements that have a variety of different

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1 provisions, all of which can bear upon the ultimate
2 price, and I think we're entitled to look at all of
3 the different terms of conditions of those agreements
4 to determine to what extent they might have affected
5 the price that's paid for the sound recording or the
6 price that's paid for the musical work.

7 You know that they go even further in this
8 case. It wasn't enough just to look at agreements in
9 our case, they wanted to know all of the facts and
10 circumstances surrounding those agreements -- who the
11 parties were negotiated, what kinds of communications
12 they had back and forth, what were the issues that
13 were raised during those negotiations? I don't have
14 a prayer of getting that kind of information in time
15 to cross examine Dr. Jaffe here, but I certainly draw
16 the line here at the agreements. I don't think the
17 fact that Dr. Jaffe did not go and look at the actual
18 agreements, which he probably should have, provides a
19 basis or an excuse for them not to comply with their
20 discovery obligations here.

21 ARBITRATOR VON KANN: As a practical
22 matter, we're talking about Jaffe testifying ten days

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1 from now, and we've got 800 agreements here to check
2 out. I mean I know you work hard, Mr. Garrett, but
3 how can this possibly be done?

4 MR. GARRETT: Well, yes. My view is that,
5 again, that all of this stuff should be stricken,
6 because they were obliged to produce those documents
7 under the rules we all agreed to on Friday. And here
8 we are, we're still arguing about those 800
9 agreements. What I have offered to do here is to take
10 a sample. I am not anxious to go through all 800, but
11 I'll take a sample on several conditions.

12 One is, is that they agree that the sample
13 we take here is indeed representative of that whole
14 group. I don't want to come in and say -- start cross
15 examining him about some agreement and say, "Oh, yes,
16 but if you had looked at the other 700 or so, you
17 would have found something entirely different." So
18 I'm willing to do as a sample as long as we all agree
19 that we can -- that the documents we actually look at
20 are truly representative of this. And this is a
21 sample of not even a randomly selected sample. I mean
22 this is just -- I still don't know how all of these

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1 movies were chosen among the hundreds of movies that
2 are done by just these companies, but we'll put that
3 aside.

4 ARBITRATOR VON KANN: He said he'll give
5 you the sample on Warner and Sony. So it's just
6 Disney that we have an issue about getting a sample,
7 as I understand it.

8 MR. GARRETT: Yes. And as it turned out,
9 from the sample that we just sort of randomly selected
10 here, Disney had the most of the agreements, at least
11 that's what I understand from Mr. Steinthal.

12 But I also want to make it clear that I
13 wanted these things -- I mean we sent an e-mail on
14 Saturday as soon as we realized that they hadn't been
15 turned over. We didn't wait until our conference call
16 Monday. We told them on Saturday we wanted these
17 agreements here. We wanted them on Monday. And then
18 we said we'll take them on Thursday. But the timing
19 of this is also critical to us.

20 ARBITRATOR VON KANN: Do I understand
21 where you are, bottom line, is if they provided a
22 sample of the Disney agreements, as they've said

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1 they're going to do on Warner and Sony, and it was --
2 I guess we may -- I don't know if we have specifics
3 about how big the sample is -- and a declaration that
4 it's representative, if they got that to you timely,
5 and we have to figure out what that means, you'd be
6 satisfied. Not gleeful --

7 MR. GARRETT: I won't be satisfied, no.
8 I think I should have had them last Friday.

9 ARBITRATOR VON KANN: You can live with
10 it. Well, satisfied is a bad word, but you could live
11 with that.

12 CHAIRMAN VAN LOON: It's something you'd
13 be willing to live with, with gritting your teeth in
14 order to help things move forward.

15 MR. GARRETT: You put that so gently.

16 ARBITRATOR GULIN: Have you come to any --
17 have you had any discussions about the number of
18 actual agreements and what manner they'll be sampled?

19 MR. GARRETT: Well, yes. This was not
20 rocket science from our standpoint, and what I did is
21 I said, "Well, we'll take movies one, four, seven,
22 ten, all the way through," and that would give us ten

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1 of the 30 movies. And of the television programs,
2 there were seven, so we did one, three, five, and
3 seven. I mean that's my idea of --

4 ARBITRATOR GULIN: By date?

5 MR. GARRETT: No, no.

6 MR. STEINTHAL: Dr. Jaffe just listed them
7 as figures by number, and they just chose numbers.
8 They knew the data corresponding with each of those
9 films, because the way that Jaffe presented it. And
10 to be candid, we have no problem, again, that the
11 sample -- instead of arguing or negotiating over
12 whether that's a fair sample or not, I'm happy to get
13 the data from that sample. My biggest problem is
14 Disney because it turned out to be five movies from
15 Disney, three from Paramount and two from Warner
16 Brothers in the movie set. And it just turns out that
17 Disney's my hardest problem, because they've got this
18 log.

19 CHAIRMAN VAN LOON: Can I just ask, I mean
20 as a practical matter, does Disney -- I know from
21 independent experience, is a different kind of fish in
22 certain respects -- I mean as a practical matter,

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1 we've got 400 songs and 30 movies, I mean and the
2 percentages come out the same. If Disney were
3 stricken and you've got 200 songs and it's still the
4 same percentages and everything, I mean the weight is
5 a little different, should we spend a huge amount of
6 time trying to solve the Disney puzzle?

7 MR. STEINTHAL: Well, I guess --

8 CHAIRMAN VAN LOON: Or is there any --

9 MR. STEINTHAL: -- my response to that is,
10 isn't it adequate to have a log kept in the ordinary
11 course with a declaration from the Disney person of --
12 and I have an example of the log which, unfortunately,
13 I don't have a lot of copies of, but I'm happy to
14 share it with everybody so you can see the layout of
15 the Disney log, that it's a quite comprehensive
16 document. But we would like --

17 ARBITRATOR VON KANN: Pass that up. Mr.
18 Garrett has seen this, I'm assuming.

19 MR. STEINTHAL: I just showed it to him
20 briefly beforehand.

21 CHAIRMAN VAN LOON: Watch these wires when
22 you come forward, Mr. Rich. You're going to need to

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1 do the high jump or something.

2 MR. STEINTHAL: You're seeing different
3 pages of the same -- of a multi-page document for one
4 movie that Disney produces. This is their log. I
5 think the name of the movie is "Crazy Beautiful." And
6 this the form of the log, and this one has, for all
7 the songs ultimately included, as you'll see, the
8 nature of the use, the publishers, the sync fee. And
9 what you would peer in the declaration is that the
10 quote is the fee in the end. I mean that's basically
11 -- the numbers here are only for those songs that are
12 actually included in the final version of the picture.

13 And if there's a situation where there's
14 an n/a under it, that would mean not applicable
15 because there was a sync but no master or there was a
16 master but no sync. And there are some annotations
17 where appropriate.

18 So the question is on Disney, whether with
19 a declaration from the head of Music as to exactly
20 what the log sets forth, and if there are any
21 particular questions that the RIAA has about what is
22 intended by X or Y or Z, then we could have that

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1 included in the declaration, whether we could use the
2 declaration plus the course of business log in lieu of
3 them having to go in and pull the dozens of
4 transactions per film for the five films and two TV
5 shows that turn out to be Disney.

6 And I'm making that argument because I've
7 been instructed to make that plea on Disney's behalf,
8 knowing that -- and to be fair, we've been -- I mean
9 I got the e-mail over the weekend, I've been in touch
10 with Mr. Garrett as of Monday. We didn't wait. We
11 had a schedule where we were going to deal with
12 discovery disputes on Tuesday. I raised the response
13 to this on Monday to try to get this data as quickly
14 as possible. We are ready to produce the summaries
15 we've received from each of the studios immediately.
16 As long as we have an understanding of what the
17 totality of the discovery obligation will be for each
18 of the studios, and then we can arrange for the sample
19 to be produced within a matter of days.

20 MR. GARRETT: I might ask under those
21 circumstances why the summaries weren't produced last
22 Friday.

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1 MR. STEINTHAL: I didn't have the
2 authority to do it, Bob, that's why.

3 MR. GARRETT: Well, this study here was
4 not done overnight here.

5 MR. STEINTHAL: It was done --

6 MR. GARRETT: This is a fairly foreseeable
7 issue that we would want that kind of underlying data.

8 ARBITRATOR GULIN: What do you think's a
9 fair timeline for receiving the samples?

10 MR. GARRETT: Three o'clock today would be
11 fine.

12 (Laughter.)

13 I mean I want this all done this week.
14 This was the week to prepare for the testimony. Once
15 you go into the hearing, as I'm certain the Panel
16 understands from experience, we are basically working
17 around the clock. I'm not going to have a real chance
18 to understand these documents and then contact people
19 about them to try to understand the nuances of how
20 people arrive at these numbers here. This was the
21 week that we have to --

22 ARBITRATOR GULIN: So you want it by

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1 Friday?

2 MR. GARRETT: I told him Thursday.

3 ARBITRATOR GULIN: Thursday?

4 ARBITRATOR VON KANN: Let me just ask him
5 one more. Would you rather have them turn over to you
6 several boxes of documents here in Washington, the
7 sample and the stuff, versus your sending somebody
8 down tomorrow to the studio to be shown the same
9 things that --

10 MR. GARRETT: Definitely. I mean I --

11 ARBITRATOR VON KANN: You want them
12 brought to you. Okay.

13 MR. GARRETT: Yes. I definitely want to
14 look at it. We made that clear. We are not sending
15 somebody out to California.

16 ARBITRATOR VON KANN: Okay.

17 MR. STEINTHAL: I made that offer
18 previously.

19 CHAIRMAN VAN LOON: What we'd like to do,
20 Mr. Garrett, is to ask you to draft an order, which
21 we've asked you to state now for the record, so that
22 we can make sure that it's agreed; that we direct the

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1 parties -- the casters -- to provide these background
2 documents that we will issue. You all will make your
3 best efforts with these non-clients -- non-parties --
4 to get what you can.

5 And we have a great deal of confidence,
6 Mr. Steinthal, in your persuasive and brokering
7 ability to produce what we'll need.

8 MR. GARRETT: Well, the order I would
9 draft, Your Honor, is that pages 17 through 22 of Dr.
10 Jaffe's testimony --

11 CHAIRMAN VAN LOON: Well, the alternative.
12 No, it's the other order that we --

13 ARBITRATOR VON KANN: I think what we're
14 talking about is the summaries and logs and so on that
15 he indicated, and samples with respect to all three
16 companies.

17 CHAIRMAN VAN LOON: Yes.

18 ARBITRATOR VON KANN: And if those are not
19 obtainable, we'll have to consider whether that
20 portion of Jaffe gets stricken or not.

21 MR. GARRETT: Okay, we'll do that.

22 Also, on Jaffe, we had two requests that

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1 I just want to clarify what the status of those are.

2 One, in footnote 60 of his report, Dr.
3 Jaffe says that he had reviewed evidence that
4 supported some conclusion that is stated there. And
5 we've asked for that evidence, whatever it was that
6 Dr. Jaffe was referring to. And we have not received
7 anything. And I don't know exactly what the status of
8 that request is.

9 CHAIRMAN VAN LOON: Mark, are you on the
10 line?

11 MR. JACOBY: Yes. And the answer is --

12 CHAIRMAN VAN LOON: Can I interrupt for
13 just a second?

14 Do we need this to be in closed session?

15 MR. GARRETT: No, this part can be in open
16 session.

17 (Whereupon, at 11:40 a.m., the proceedings
18 went into Open Session.)

19

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 in Sound Recording and Ephemeral
 Recording,
 Docket No. 2000-9 CARP DTRA 1 & 2

Before: Library of Congress
 Copyright Arbitration Royalty Panel

Date: October 10, 2001

Place: Washington, DC

represents the full and complete proceedings of the
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